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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992

MM Docket No. 92-266

Rate Regulation

VIACOM OPPOSITION TO PETITION FOR RECONSIDERATION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

Rate Regulation)

MM Docket No. 92-266

VIACOM OPPOSITION TO PETITION FOR RECONSIDERATION

Viacom International Inc. ("Viacom"), by its attorneys, hereby submits its opposition to the petition of New York Telephone Company and New England Telephone and Telegraph Company ("Petitioner") seeking reconsideration of the Commission's Second Report & Order in the above-cited rate regulation proceeding.¹ In challenging the Commission's determination that it must include each of the three statutory categories of systems subject to effective competition in its formulation of rate regulation benchmarks, Petitioner merely provides a cursory reiteration of a position previously fully briefed and thoroughly refuted by the Commission. Petitioner's fundamental grievance is that the plain language of the Cable Television Consumer Protection and Competition Act (the "1992 Cable Act" or "Act") does not support what it considers the only "real" measure of effective

¹ See First Order on Reconsideration, Second Report & Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428 (rel. Aug. 27, 1993), 58 Fed. Reg. 46,718 (1993) ("Second Report & Order").

competition to cable operators and, in turn, does not permit a draconian reduction in cable rates.

In its Second Report & Order, the Commission fully considered claims that it should exclude from its benchmark calculations the rates of systems deemed subject to "effective competition" on the basis that they have less than 30 percent penetration. See 47 U.S.C. § 543(l)(1)(A). Some commenters had asserted that this statutory definition constrained the Commission only in determining whether systems were subject to rate regulation, but not in establishing the benchmarks governing the rates of systems subject to such regulation. This contention did not survive a plain reading of the Act, however.² The

² The 1992 Cable Act deems cable systems with less than 30 percent penetration to be subject to "effective competition" as that term is used, without exception, throughout its rate regulation provisions. 47 U.S.C. § 543(l)(1)(A). The provisions specifically governing basic rate regulation, in turn, expressly cite "effective competition" not only as the standard for whether systems are subject to regulation, but also as the standard for how rate regulation should be formulated where applicable: Commission "regulations shall ... protect[] subscribers of any cable system that is not subject to effective competition from rates ... that exceed the rates that would be charged ... if such systems were subject to effective competition." Id. at § 543(b)(1). This section further specifies that, in prescribing basic rate regulations, "the Commission ... (C) shall take into account ... (i) the rates for cable systems, if any that are subject to effective competition." Id. at § 543(b)(2)(C)(i). The Act's standards for rate regulation of cable programming services likewise expressly calls for consideration of "the rates for cable systems, if any, that are subject to effective competition." Id. at § 543(c)(2)(B).

Evidence of legislative intent to strictly control the meaning and application of a statutory term is particularly forceful when that language is explicitly identified as a defined term, which "controls the construction of that term wherever it

(continued...)

Commission appropriately acknowledged the lessons of the ACLU case in ruling that it was not "free to change the definition of systems subject to effective competition merely because petitioners might devise a definition they think is more appropriate." Second Report & Order at ¶ 131.³

Not addressing this controlling ACLU precedent, Petitioner emphasizes that "effective competition" is only one of several statutory factors governing the standards for rate regulation and that Congress did not mandate that any one of these factors be given greater weight than another. Viacom agrees with this observation.⁴ Yet it is a non sequitur to conclude on this basis

²(...continued)
appears through the statute." Florida Dep't of Banking and Finance v. Board of Governors of the Federal Reserve System, 800 F.2d 1534, 1536 (11th Cir. 1986), cert. denied, 481 U.S. 1013 (1987). Moreover, the Act's legislative history reveals congressional concern regarding prior FCC redefinitions of this very term and thus a direct legislative intent to reserve to Congress full control over the defining of "effective competition." See H.R. Rep. No. 628, 102d Cong., 2d Sess. 33 (1992).

³ The D.C. Circuit, in a case squarely controlling this issue, admonished an earlier Commission that it did not "enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with a definition of that very term contained in the Act itself." American Civil Liberties Union v. FCC, 823 F.2d 1554, 1567 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988).

⁴ Viacom does not believe that the 1992 Cable Act requires, or even warrants, that the Commission focus solely on the rates of systems subject to "effective competition" as the sine qua non of its rate regulation standards -- thereby ignoring the individual costs of providing cable service enumerated in the statute. However, inasmuch as the Commission has chosen to construct benchmarks based exclusively upon a survey of systems
(continued...)

that the Commission is therefore free to exclude low penetration systems in its formulation of rate regulation benchmarks. That the Commission could have, and arguably should have, taken greater account of additional factors does not mean that the Commission has any discretion to redefine the "effective competition" factor. Indeed, Petitioner does not argue that its desired subset of systems subject to "effective competition" is in any way mandated, or even supported, by consideration of any of those other statutory criteria.⁵ The Act simply does not give the Commission the discretion to redefine "effective competition" under the guise of "considering" or "taking into account" this statutory term as but one of many factors.⁶

Even if the Commission were free to rewrite the definition of effective competition, moreover, the Commission -- noting the logic and consistency of concluding that low penetration systems

⁴(...continued)
subject to "effective competition," the plain language and purpose of the statute and the controlling judicial precedent together bar the Commission from redefining that term as Petitioner effectively asks it to do.

⁵ None of these other criteria, in fact, bears any relationship to the categories of systems which Petitioner submits should serve as the paramount standard for rate regulation. Yet provisions of the Act cited by Petitioner demonstrate that Congress was fully capable of using the concept of "multichannel competition," rather than "effective competition," where appropriate.

⁶ Given the draconian reduction in rates that would likely result from the exclusion of the low penetration sample, nothing short of explicit legislative redefinition of "effective competition" would warrant Commission reversal of its careful reading of the statute in this regard.

lack the market share necessary to attain monopoly profits -- appropriately found that excluding such systems from benchmark calculations would be imprudent as a matter of policy, as well. Indeed, while Viacom has previously documented significant flaws in the calculation of the benchmark tables, inclusion of low penetration systems remains crucial to making those tables more closely approximate competitive rates.⁷ Of course, were the Commission at liberty to craft anew the perfect definition of systems "truly" subject to effective competition, it would be obligated to disregard at least some systems in the two other statutory categories -- head-to-head cable competitors and municipally-owned systems -- whose rates demonstrably do not reflect sustainable, equilibrium prices.

The 1992 Cable Act has preempted the need for any such debate, however. As the Commission has clearly ruled, the Act explicitly and precisely defined the categories of systems facing effective competition -- and therefore each of those categories must be included in calculating any "competitive" benchmark for rate regulation. The Commission should reject Petitioner's

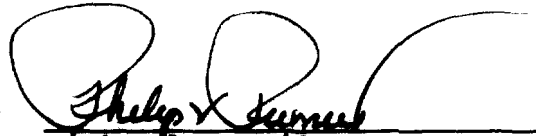
⁷ See Petition for Reconsideration and Clarification in MM Docket No. 92-266, filed by Viacom (June 21, 1993) at Appendix pp. 8-16, 24 (Dertouzos/Wildman Study).

result-driven claims to the contrary and, accordingly, deny its petition for reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 1993, I caused a copy of the foregoing "Opposition to Petition for Reconsideration" to be mailed via first-class postage prepaid mail to the following:

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